No. 17-155

IN THE

Supreme Court of the United States

ERIK LINDSEY HUGHES,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Pursuant to this Court's Rule 37.3(b), the law professor *Amici* listed in the Appendix to the *Brief of Law Professors as Amici Curiae in Support of Neither Party* respectfully request leave of the Court to file this *Amici Curiae* Brief. Both parties were notified in a timely manner of the intent of these *Amici* to file the attached Brief as required by Rule 37.3(b). Written consent to the filing of this Brief has been granted by counsel for the Petitioners. Counsel for Respondent did not respond to *Amici*'s request for consent, necessitating the filing of this Motion.

This case presents a challenge to the operation of the narrowest grounds doctrine. *Amici* are law professors whose areas of specialization include a wide range of bodies of Supreme Court case law, including in areas that have produced non-majority opinions. *Amici* have an interest in ensuring the proper application of the narrowest grounds rule, and they submit this Brief to clarify the doctrine's scope and application, including identifying the specific conditions under which the premises of the doctrine do, and do not, apply.

Accordingly, *Amici* respectfully request that the Court grant the Motion for leave to file this *Amici Curiae* Brief.

Respectfully submitted,

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INTEREST OF *AMICI*

Amici's Counsel of Record[1] is a Professor of Law at the University of Maryland Carey School of Law. He specializes in *Constitutional Law* and *Law and Economics*. Over the past twenty-five years, he has written extensively on, among other topics, the narrowest grounds doctrine. His published books and articles include works focused on the doctrine or treating it as part of a larger descriptive analysis of the Supreme Court's role in judicial administration. *Amici*, listed in the Appendix, are ten Professors of Law from nine law schools. They hold broad expertise in Constitutional Law, Federal Courts, Administrative Law, and other fields, and each is interested in the proper application of the narrowest grounds rule.

SUMMARY OF ARGUMENT

Petitioner claims that the narrowest grounds doctrine, articulated in *Marks v. United States*, 430 U.S. 188 (1977), cannot be applied in *Freeman v. United States*, 564 U.S. 522 (2011). *Freeman* controlled the outcome of Mr. Hughes's case before the United States Court of Appeals for the Eleventh Circuit. Sustaining petitioner's claim requires that *Freeman* fall within a small class of non-majority Supreme Court cases in which the premise of the narrowest

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[1] No counsel for a party authored this Brief in whole or in part. No party or party's counsel financially supported this Brief, and no one other than *Amici* and their counsel financially contributed to this Brief.

grounds doctrine fails to apply. Petitioner's claim is mistaken. Petitioner's argument rests on a flawed premise that, when exposed, reveals that *Marks* applies to *Freeman* in a straightforward manner.

Abandoning *Marks* would create two major problems. First, it would create considerable guidance problems for lower courts; and second, it would undermine norms within this Court that motivate the successful formation of majority opinions. Abandoning *Marks* would have consequences beyond non-majority cases.

The small category of non-majority Supreme Court cases to which the narrowest grounds rule fails to apply possesses specific and identifiable features. *Freeman* lacks those features and does not fall within that category. *Freeman* falls within the larger category of conventional non-majority cases to which *Marks* easily applies. The three *Freeman* opinions align on a normative dimension, from a broad to narrow willingness to reconsider a sentence imposed pursuant to a plea when part of the relevant Federal Sentencing Guidelines was later retroactively reduced. Along that dimension, Justice Kennedy's plurality opinion provides the broadest basis for relief, allowing a blanket right to reconsideration; Justice Sotomayor's concurrence in the judgment provides an intermediate basis for relief, allowing reconsideration only in a specified class of cases, including Mr. Freeman but not Mr. Hughes; and the Chief Justice's opinion provides no basis for relief, embracing a contrary blanket prohibition on reconsideration, denying relief to both Freeman and Hughes. Under *Marks*, the opinion consistent with the judgment decided on narrowest grounds expresses the holding.

Justice Sotomayor's opinion, which provides the narrowest basis for granting relief to Freeman along the identified dimension, satisfies this test.

The premise of *Marks* fails to hold only when the opinions within a non-majority case cannot be expressed along a single dimension, instead implicating two dimensions.[2] When this occurs, opposite resolutions of the controlling case issues support the judgment, whereas a partially favorable issue resolution to each opinion supporting the judgment results in dissent. For example, in a non-majority case in which a plurality of four denies standing but would grant relief on the merits; a single concurrence in the judgment grants standing but denies relief on the merits; and the dissent for four would grant standing and would provide relief on the merits, five justices deny relief despite separate majorities supporting standing and relief on the merits. Neither opinion consistent with the judgment states the holding on narrower grounds; the plurality is narrower on the question of standing; and the concurrence in the judgment is narrower on the merits. When this occurs, majority resolutions of controlling case issues lead to the dissenting result. Because such cases implicate two normative dimensions, each essential to the judgment, the *Marks* premise fails to hold.

Marks applies in typical non-majority Supreme Court cases because most cases, including *Freeman*, implicate one dimension. This includes non-majority cases with multiple issues.

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[2] The holds true regardless of the substantive body of law.

Lower courts and legal scholars have characterized the intuition underlying the narrowest grounds rule in various ways. Characterizations include embedded reasoning, logical subset, lowest common denominator, and even nested Russian dolls. Each is consistent with recognizing the dimensionality of non-majority cases. Although dimensionality analysis reaches the same outcome in every case in which these methods apply, dimensionality provides additional analytical tools for identifying the small subset of non-majority cases in which the *Marks* premise fails to hold. That category excludes *Freeman*.

Abandoning *Marks* in favor of Petitioner's proposed alternatives would undermine lower court guidance and norms motivating majority decisions in this Court. The implications of *Marks* extend beyond cases to which the doctrine formally applies.

Freeman is not a case of ambiguous dimensionality. The hypotheticals described in *United States v. Epps*, 707 F.3d 337, 348–51 (D.C. Cir. 2013), and *United States v. Davis*, 825 F.3d 1014, 1023–24 (9th Cir. 2016) (en banc), on which Petitioner relies, are not inconsistent with recognizing that Justice Sotomayor's *Freeman* concurrence in the judgment controls under *Marks*. Instead, the hypotheticals implicate the distinction between holding and *dictum*.

Amici do not address the merits of *Hughes*. Because the *Marks* doctrine applies only to lower courts, not the Supreme Court, this Court may resolve *Hughes* as it pleases without reconsidering, or abandoning, *Marks*.

ARGUMENT

I: *Freeman v. United States* is not Among the Rare Cases in which the Premise of *Marks* Fails to Hold

In *Marks v. United States*, 430 U.S. 188 (1977), the Court addressed the following question: Does a criminal defendant have a due process right to rely upon a stringent prosecutorial standard on which he based his course of conduct, announced in a plurality decision, *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), rather than the subsequently relaxed prosecutorial standard set out in the majority opinion, *Miller v. California*, 413 U.S. 15 (1973), where *Miller* effectively reinstated the pre-*Memoirs* majority opinion standard set out in *Roth v. United States*, 354 U.S. 476 (1957)?

Marks is the obverse case of *Freeman* and *Hughes*. The latter offenders sought the benefit of a subsequent favorable legal change, a reduction in part of the Federal Sentencing Guidelines; Marks sought to *avoid* the retroactive application of a subsequently unfavorable legal change, a lowered prosecutorial standard.

Marks is critical to *Hughes* in several respects. First, the case history clarifies that although *Marks* binds lower courts, the Supreme Court only gives precedential status to its majority decisions. Second, the narrowest grounds rule is based on earlier practice. Although that practice was not universally fol-

lowed,[3] this Court recognized it before *Marks*. *See Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

The *Marks* Court's expression of the narrowest ground doctrine has generated some confusion in lower courts. The statement itself is unobjectionable. The study of collective decision making reveals an inevitable subset of non-majority cases in which the premise of *Marks* fails to hold. When this occurs, the narrowest grounds doctrine cannot be successfully applied.[4] Such cases have generated scholarly proposals to abandon *Marks*. Doing so would create considerable guidance problems in lower courts respecting non-majority cases, and would undermine norms within this Court respecting the formation of majority opinions. The narrowest grounds rule illustrates Voltaire's admonition that "Perfect is the enemy of good." Susan Ratcliffe, *Concise Oxford Dictionary of Quotations* 389 (2011). *Marks* is a good rule in a con-

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[3] *See, e.g., Marks v. United States*, 430 U.S. 188, 189 n.1 (1977). The *Marks* Court reviewed lower court decisions choosing whether to apply the obscenity standard announced in *Miller v. California*, 413 U.S. 15 (1973), or *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), but assumed, along with lower courts, that the controlling *Memoirs* opinion was the plurality.

[4] Not all such cases create practical difficulties. Some non-majority cases in which *Marks* fails to apply require only a binary determination on the application of a rule. *See* Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 831–35 (2017) (illustrating with *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949)).

text in which no rule can be perfect. Displacing *Marks* invites far greater problems than those remaining with *Marks* in place.

A. *Marks* requires that opinions in non-majority cases align along a single dimension

The *Marks* petitioners were convicted of distributing obscene materials pursuant to jury instructions modeled on *Miller v. California*, 413 U.S. 15 (1973), a case decided after the underlying criminal activity, and subsequent to *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).[5] *Memoirs* had announced a stricter prosecutorial standard by which petitioners claimed to have charted their course of conduct. The district court based the jury instruction on the *Miller* standard, and the Sixth Circuit affirmed the conviction.

The *Marks* petitioners maintained that applying the retroactively relaxed *Miller* standard, premised on contemporary community standards, violated their due process right to rely upon the stricter nar-

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[5] For more detailed presentations, see Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321 (2000); MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 124–29 (2000); Maxwell L. Stearns, *Should Justices Ever Switch Votes?:* Miller v. Albright *in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87, 111–17 (1999); Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to John Roger and Others*, 49 VAND. L. REV. 1045 (1996).

rowest grounds holding in *Memoirs*. The *Memoirs* plurality raised the prosecutorial threshold, relative to *Roth v. United States*, 354 U.S. 476 (1957), to "utterly without redeeming social value." *Memoirs*, 383 U.S. at 418. As Justice Powell explained in *Marks*, the *Miller* Court described the *Memoirs* obscenity standard as all but impossible for prosecutors to meet. *Marks*, 430 U.S. at 194 (citing *Miller*, 413 U.S. at 22)).

Unlike *Roth* and *Miller*, *Memoirs* was a non-majority opinion, consisting of a plurality, two concurrences in the judgment, and several dissents. Together, *Miller* and *Marks* reveal two central insights. First, the *Miller* majority declined to give *Memoirs* precedential status, rejecting the plurality's test on its merits. This is consistent with the principle that the Supreme Court only affords its majority decisions precedential status. Second, in *Marks*, the Supreme Court instructed that lower courts are bound by non-majority Supreme Court decisions, rejecting the Sixth Circuit claim that, like the Supreme Court, it need only treat majority Supreme Court decisions as precedents. Because *Memoirs* did not command majority support, a split Sixth Circuit panel determined that "*Memoirs* never became the law." *Marks*, 430 U.S. at 192. Justice Powell explained that on such reasoning, the *Marks* issue was whether *Miller* significantly altered the *Roth* standard, which it did not.

Justice Powell stated:

> [W]e think the basic premise for this line of reasoning is faulty. When a fragmented Court de-

> cides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . ." *Marks*, 430 U.S. at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

Marks not only established that lower courts must afford precedential status to its non-majority decisions. It further instructed lower courts on how to identify the controlling opinion in such cases.

The analysis requires expressing the *Memoirs* opinions along a normative dimension. This helps identify the limiting case category to which the *Marks* premise fails to hold. A "dimension" is a normative measure used to assess virtually anything one wishes to compare.[6]

Justices Black and Douglas separately took the most protective view, expressing their "well-known position that the First Amendment provides an abso-

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[6] *See* Maxwell L. Stearns, Obergefell, Fisher, *and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043, 1067-1106 (2017) (relating dimensionality to tiers of scrutiny); DONALD G. SAARI, DISPOSING DICTATORS, DEMYSTIFYING VOTING PARADOXES: SOCIAL CHOICE ANALYSIS 13–14 (2008) (relating dimensions to "cycling," defined as intransitive collective preferences).

lute shield against governmental action aimed at suppressing obscenity." *Marks*, 430 U.S. at 188 (citing *Memoirs*, 383 U.S. at 421, 424 (Black, Douglas, JJ., concurring in the judgment)). For ease of exposition, Justice Stewart is included in a three-Justice camp, A/B, with those concurring in the judgments.[7] Justice Brennan, for a plurality of three, set out the "utterly without redeeming social value" test. Finally, Justices Clark, White, and Harlan dissented, with Justices Clark and White adhering to the *Roth* holding, and Justice Harlan reasserting his view, expressed in *Roth*, that only hard-core pornography may be prosecuted federally, with state obscenity laws subject to rationality review.

Memoirs provides a template for non-majority cases in which *Marks* applies in a straightforward manner. When the opinions within non-majority cases align along a single dimension, the relationships can be described with any method previously identified. These characterizations are a complementary and consistent means of expressing a core insight, one helpfully expressed visually.

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[7] Justice Stewart's decision presents a trivial classification problem because it does not neatly align along the dimension of broad-to-narrow obscenity protection. He was listed as concurring in the dismissal for reasons expressed in his dissenting opinion in *Ginzburg v. United States*, 383 U.S. 463, 497, 499 (1966), where he stated that the First Amendment only allows suppressing "hardcore pornography" as obscene. The placement does not affect the analysis; with six Justices supporting the judgment, the same result obtains no matter which group Stewart is placed with, even the dissent. For ease of exposition, Stewart is placed with the remaining concurrences, creating three equal-size groups.

Table 1: *Memoirs v. Massachusetts* in One Dimension

(A) Douglas & Black (concurring)	(B) Stewart (concurring)	**(C) Brennan, Fortas, and Warren (plurality)**	(D) Clark, Harlan, and White (dissenting)
No proscribable obscenity	Only hard-core pornography proscribable obscenity	**"Utterly without redeeming social value" standard for proscribable obscenity**	*Roth* standard (Clark and White) or rational basis test (Harlan) for proscribable obscenity
Broad obscenity protection			**Narrow obscenity protection**

Table 1 arrays the *Memoirs* opinions along a dimension that reveals Justice Brennan's plurality (in bold) as controlling on narrowest grounds. In social choice theory, this opinion is the "Condorcet winner," meaning the dominant second choice among three opinions when none has first-choice majority sup-

port.[8] This framing identifies not only those non-majority cases where *Marks* applies in a straightforward manner, but also the cases which the premise of a single dimension does not hold.

Memoirs is a conventional non-majority case because the opinions align along a single dimension. A dimension does not imply a single issue; multiple issues often align along one dimension. Revising the opening example in which two issues, standing and the merits, yielded two dimensions, illustrates this point. If the Justices who conferred standing supported relief on the merits, and if the Justices who denied standing opposed relief on the merits, the opinions would align along a single dimension, capturing broad-to-narrow bases for relief. Along that dimension, the resolution of standing and the merits coincide. Those Justices who grant standing and relief on the merits rule for the claimant; those Justices who deny standing and relief on the merits, rule against the claimant.[9]

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[8] *See* Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1253 (1994); H.P. Young, *Condorcet's Theory of Voting*, 82 AM. POL. SCI. REV. 1231, 1239 (1963).

[9] Cases fitting this more general case category include *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *Casey* presented two issues, first, whether to respect *Roe v. Wade*, 410 U.S. 113 (1973), as precedent, and second, whether to strike down the challenged Pennsylvania abortion restrictions under the selected standard of review. Those issues collapsed along a dimension capturing broad-to-narrow rights to terminate unwanted pregnancies. Those Justices adhering to *Roe* as precedent voted to strike

The *Memoirs* opinions align along a dimension capturing broad-to-narrow obscenity protection. Justices Douglas, Black, and Stewart occupy the broad end, reversing the conviction with virtually complete protection; the dissenters occupy the narrow end, upholding the conviction with little protection. The plurality reversed the conviction, but announced a test permitting some future prosecutions to proceed. Of these groupings, the plurality expresses the holding on the narrowest grounds. As Justice Powell observed, except for the Sixth Circuit in *Marks* itself, "every Court of Appeals that considered the question between *Memoirs* and *Miller* so read our decisions." *Marks*, 430 U.S at 994.

Justice Powell thus emphasized a critical aspect of *Marks*. Contary to *Brief of Petitioner* (p.38), the case did not so much announce a new rule of federal common law as endorse a prevailing federal common law practice among lower courts. That practice is an almost inexorable command when

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down the challenged abortion restrictions, and those rejecting *Roe* as precedent voted to sustain those restrictions. For the portions of *Casey* not resolved by majority opinion, the plurality opinion, which upheld all but the spousal notification provision, expressed the holding on narrowest grounds for each separate judgment along the relevant dimension. The same analysis applies in *Bakke* on the issues whether (1) the use of race was legally permissible, and (2) whether the chosen method of employing race survived the selected standard of review, with the result that Justice Powell's opinion controlled for both parts of the Court's judgment. When the Court partially affirms and partially reverses the judgments below, as in these cases, the *Marks* analysis applies separately to each judgment.

construing non-majority Supreme Court decisions.

The several alternative methods of expressing the logic of *Marks* are complementary. Consider, for example, identifying the opinion consistent with the outcome with the least impact on the law. Whereas the concurring justices would prevent virtually all obscenity prosecutions, the plurality would allow some prosecutions to proceed. The lesser impact renders the plurality opinion narrower. Consider also embedded reasoning, logical subset, lowest common denominator, or nested dolls. Upon reversing the conviction, thereby granting relief, the rule allowing some future cases to proceed embraces reasoning embedded within; is a logical subset of; includes the lowest common denominator for; and is a smaller doll than, the broader rule disallowing any future cases to proceed. Finally, consider locating the opinion consistent with the outcome along the relevant dimension that is closest to the dissent. That too is the plurality opinion.

Although consistent with each formulation, the dimensionality analysis alone provides the means for identifying the limiting case. Once more, assume three coalitions: the concurring Justices, A/B; the plurality, C; and the dissenters, D. Along the dimension of broad-to-narrow obscenity protection, *Memoirs* is a straightforward case. Consider one more consistent technique, previously employed in the United States Court of Appeals for

the Seventh Circuit[10]: Each group embracing a more extreme position along the identified dimension intuitively ranks the intermediate level of protection ahead of the opposing extreme rule. The plurality emerges as a dominant second choice, or Condorcet winner, defeating each other opinion in direct pairwise comparisons.[11]

Some scholars have presented such framings as competing methods of applying *Marks*.[12] They are not. Each consistently captures the prevailing interpretation of *Marks*, including the dimensionality analysis. That final method, however, is more precise because it provides a means of identifying when the assumptions needed to apply *Marks* do not hold.

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[10] *See United States v. Gerke Excavating*, 464 F.3d 723, 724 (7th Cir. 2006) (per curiam) (Posner, Easterbrook, and Evans) ("When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose.").

[11] As applied to *Memoirs*, the analysis implies that the concurrences rank A/B, C, D; the dissent ranks D, C, A/B, and the plurality could rank either C, A/B, D or C, D, A/B. Either way, the plurality, C, emerges as the Condorcet winner, defeating A/B and D in direct comparisons.

[12] *See, e.g.*, Williams, *Questioning* Marks, *supra* note 4; Richard M. Re, *Beyond the Marks Rule* 24–36 (Dec. 19, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090620.

B. The Marks Premise Fails when Opinions Do Not Align Along One Dimension

Kassel v. Consolidated Freightways, 450 U.S. 662 (1981), reveals the limited conditions under which the premise of *Marks* fails to hold. Petitioner challenged an Iowa ban on the use of 65-foot twin trailers, which surrounding states allowed, with exceptions benefiting in-state interests. The Supreme Court struck down the challenged law without a majority opinion. Justice Powell wrote for a plurality of four; Justice Brennan concurred in the judgment for two; and then-Associate Justice Rehnquist dissented for three.

The opinions agreed on the underlying issues: (1) Should the trial court apply a balancing test, independently weighing the law's asserted safety justifications against the claimed burdens on interstate commerce, or, should it apply deferential rationality review, disallowing judicial weighing?; and (2) Whichever substantive test applies, must the trial court exclude evidence, introduced initially at trial, supporting arguments not considered by contemporaneous lawmakers? Each issue, the substantive test and the evidentiary rule, presented a binary choice: apply a strict or a lax rule.

Justice Powell, writing for the plurality, applied the lax evidentiary rule, allowing novel evidence, but the strict substantive rule, independently weighing of costs and benefits. He concluded that the federal interest in commerce outweighed the state's asserted safety justifications. Justice Brennan, concurring in the judgment, resolved each issue in opposite fashion, applying the

lax rationality test, but applying the strict evidentiary rule, disallowing trial evidence supporting novel justifications. Excluding such evidence, Justice Brennan determined that the actual legislative justifications pointed toward protectionism. Because protectionism cannot be a rational justification, he found the challenged law *per se* invalid. Finally, Justice Rehnquist partially agreed with each remaining opinion, yet he dissented. He agreed with Justice Brennan that the courts should not independently weigh costs and benefits, applying the lax rationality test. And he agreed with Justice Powell that novel evidence was admissible. Coupling the lax substantive test with the lax evidentiary rule, Rehnquist concluded that novel evidence supported a rational justification for the law.

As shown in Table 2, because *Kassel* implicates two dimensions, the *Marks* premise fails to hold.

Table 2: *Kassel v. Consolidated* Freightways in Two Dimensions

		Narrow	**Broad**
		Rational Basis	Balancing
Narrow	Admit Novel Evidence	(B) Rehnquist, Burger, Stewart	(A) Powell, White, Brennan, Stevens
Broad	Exclude Novel Evidence	(C) Brennan, Marshall	

The following assumption is consistent with each *Kassel* opinion: If (1) rational basis applies, and (2) novel evidence is admissible, the law should be sustained; absent either precondition to sustaining the law, it should be struck down. Justices Powell and Brennan each denied one condition needed to sustain the law, with Justice Powell applying the stricter substantive test and with Brennan applying the stricter evidentiary rule. Justice Rehnquist found both conditions necessary to sustain the challenged law, but dissented.

The analysis can be expressed in various ways. First, consider separate majority resolutions of each controlling issue. One majority applies rationality review (the Justice Brennan plus Justice Rehnquist camps, totaling five). A second majority admits novel evidence (the Justice Powell plus Justice Rehnquist camps, totaling seven). Issue by issue, the dissent prevails.[13] Instead, the case is resolved by outcome voting, with the Justice Powell and Justice Brennan camps, totaling six, striking the law down. Alternatively, consider intuitive rank orderings by each camp over the remaining opinions. Unlike in *Memoirs*, the exercise fails. *A priori*, we cannot assume that either camp voting to strike down the challenged law would rank second an opinion agreeing on one issue, yet reaching the opposite judgment, or an opinion opposite on both issues, yet reaching the same judgment.[14]

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[13] Some scholars advocate various forms of issue voting, a question not before this Court. For a critical analysis, see Stearns, *Outcome Voting*, *supra* note 5 (reviewing literature). *See also Hanover 3201 Realty v. Village Supermarkets, Inc.*, 806 F.3d 162, 184, 189 (3d Cir. 2015) (Ambro, J., dissenting in part and concurring in part) (defending his vote switch and reviewing literature in part III); *id.* at 196, 204 (Greenberg, J., dissenting) (criticizing Judge Ambro's vote switch and reviewing literature in part II).

[14] For a discussion expressing this in terms of a cycle, see STEARNS, CONSTITUTIONAL PROCESS, *supra* note 5, at 99–106 (demonstrating that with preferences (A) ABC, (B) BCA, and (D) CAB, A is preferred to B, and B is preferred to C, yet C is preferred to A.) Social choice theorist Donald Saari ascribes cycling to "the curse of dimensionality." *See* SAARI, *supra* note 6.

In non-majority cases implicating two dimensions, the *Marks* premise does not hold. Neither opinion consistent with the *Kassel* outcome expresses the holding on narrowest grounds. Because *Kassel* struck down the Iowa statute, the narrowest grounds opinion achieves that outcome while striking down the fewest laws. On the standard of review, Justice Brennan's opinion is narrower because rationality review would sustain more laws, and on the evidentiary rule, Justice Powell's opinion is narrower because admitting novel evidence would sustain more laws. Because neither ground alone sustains the challenged law, the opinions implicate two dimensions.

The characteristic features of cases implicating two dimensions are separate opinions achieving the same judgment with opposite resolutions of each dispositive issue, and a dissenting opinion resolving one issue favorably to each remaining camp, yet producing the opposite judgment. This coincides with majority resolutions of controlling issues leading to the dissent.

C. The Eleventh Circuit Correctly Applied *Marks* to *Freeman*

As *Miller* and *Marks* demonstrate, this Court may select the reasoning of any of the *Freeman* opinions, or it may devise a new rule. Lower courts are bound by the narrowest grounds doctrine; this Court is not. The *Marks* Court resolved how to identify the narrowest grounds opinion in *Memoirs* to assess petitioners' due process claim. It did so having already displaced the plurality *Memoirs* standard in *Miller*.

Applying *Marks* to *Freeman* is, nonetheless, straightforward. Freeman entered into a plea agreement, pursuant to FED. RULE CRIM. P. 11(c)(1)(C), and the relevant range for one offense was later retroactively reduced under the Federal Sentencing Guidelines. Under 18 U.S.C. § 3582(c)(2), convicted offenders may be considered for resentencing following a plea if the plea was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . ." In *Freeman*, the Supreme Court addressed the circumstances in which a sentence imposed following a plea agreement satisfies that statutory test.

Justice Kennedy's plurality opinion defined sentences following a plea agreement that are based on the guidelines broadly. He stated: "Rule 11(c)(1)(C) makes the parties' recommended sentence binding on the court 'once the court accepts the plea agreement,' but the governing policy statement confirms that the court's acceptance is itself based on the Guidelines. See USSG § 611.2." *Freeman*, 564 U.S. at 529. By contrast, Justice Sotomayor's concurrence in the judgment defined when a sentence imposed following a plea agreement should be presumed to be based on the Guidelines more narrowly. She concluded that following a plea, the sentence should be presumed to be based on the agreement rather than the Guidelines, except in the following circumstances: when (1) "agreements . . . call for the defendant to be sentenced within a particular Guidelines sentencing range," or (2) "a plea agreement . . . provide[s] for a specific term of imprisonment—such as a number of months—but also make[s] clear that the basis for the specified term is a Guidelines sentencing range

applicable to the offense to which the defendant pleaded guilty." *Id.* at 538–39 (Sotomayor, J., concurring in judgment). Finally, the Chief Justice, writing in dissent for four, determined that a sentence entered pursuant to a plea is not based on the Guidelines, but rather is based on the plea agreement. Although the Chief Justice voted to deny Freeman relief, he agreed with the plurality that Justice Sotomayor's test was unworkable. *Id.* at 544 (Roberts, C.J., dissenting).

The *Hughes* parties agree that there is a material difference in the facts of *Freeman* and *Hughes*. In *Freeman*, part of the sentence was based on the low end of the permissible Guidelines range, which was subsequently retroactively reduced. In *Hughes*, the plea agreement was below the low end of the Guidelines range, and did not otherwise meet Justice Sotomayor's two exceptions to eligibility for reconsideration, but it did fall within the scope of Justice Kennedy's broader presumption that the sentencing judge considered the Guidelines in imposing the sentence following a plea.

This difference produces divergent outcomes under *Freeman* depending on whether Justice Kennedy's opinion or Justice Sotomayor's opinion controls. The *Freeman* plea contained elements that allowed Justices Sotomayor and Justice Kennedy both to conclude that the sentence was based on the Guidelines. By contrast, the Eleventh Circuit determined that under Justice Kennedy's test, the *Hughes* plea was based on the Guidelines, whereas under Justice Sotomayor's test, it was not. The parties do not dispute this. The Eleventh Circuit recognized that choosing the controlling opinion under the narrowest

grounds doctrine controlled the case outcome, denying Hughes relief.

Despite criticizing Justice Sotomayor's analysis, the plurality and dissent each treated it as controlling under *Marks*. Justice Kennedy stated: "the opinion concurring in the judgment suggests an intermediate position." *Freeman*, 564 U.S. at 532. The Chief Justice implicitly conceded that as well, devoting nearly his entire dissent to refuting the merits of her analysis. Chief Justice Roberts also stated: "Finally, JUSTICE SOTOMAYOR's approach will foster confusion in an area in need of clarity," *id.* at 550 (Roberts, C.J. dissenting), and "But those who will really be left with a sour taste after today's decision are the lower courts charged with making sense of it going forward." *Id.* at 551.

The *Hughes* court likewise identified Justice Sotomayor's opinion as controlling:

> When applying the rule of *Marks* to a splintered Supreme Court opinion, we must determine which opinion that supports the judgment relied on the narrowest grounds. Applying this rule to *Freeman*, it is clear that Justice Sotomayor's opinion controls because "'sometimes' is a middle ground between 'always' and 'never.'" *Duvall*, 740 F.3d at 612 (Kavanaugh, J., concurring in the denial of rehearing en banc). As a result, we must apply Justice Sotomayor's concurring opinion to determine whether Hughes qual-

> ifies for a sentence reduction under section 3582(c)(2). *United States v. Hughes*, 849 F.3d 1008, 1015 (11th Cir. 2017).

Petitioner Hughes implies that Justice Sotomayor's opinion controls under *Marks*. Along with Respondent, Petitioner concedes that whereas Justice Kennedy's analysis provides relief, and the dissent denies relief, to both Freeman and Hughes, Justice Sotomayor's approach would grant relief to Freeman, but deny relief to Hughes. One can characterize this using any of the previously identified framings. Each reinforces the intuition that the *Freeman* opinions can be expressed along one dimension. The reasoning of Justice Sotomayor's opinion is embedded within, is a logical subset of, embraces the lowest common denominator respecting, and is nested within, Justice Kennedy's broader approach. It is likewise consistent to express Justice Sotomayor's opinion as the Condorcet winner, the dominant second choice, the opinion consistent with the outcome closest to the dissent, or the median position. Each framing expresses the same intuition and achieves the same result. This is true not only in *Freeman*, but in every case in which the *Marks* premise holds.

The Eleventh Circuit correctly applied *Marks* to *Freeman* in *Hughes*. Although this Court need not revisit that application to resolve this case, should it wish to provide additional guidance to lower courts

in applying *Marks*, *Amici curiae* suggest the following[15]:

> When this Court issues a non-majority decision, lower courts should presume that the opinions can be expressed along a single dimension, and when all justices are participating, apply that opinion that represents the median position on the Court, generally coinciding with the position closest to dissent for each separate judgment. When two or more opinions consistent with the outcome resolve the controlling issues in opposite fashion, yet reach the same judgment, and when the dissenting opinion resolves one or more issues favorably to each of those opinions yet achieves the opposite judgment, the premises underlying the narrowest grounds rule do not apply. This is evident when

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[15] This statement broadly covers all but a minuscule subset of non-majority opinions not implicated in *Hughes*, and thus better addressed in such a case. As explained in STEARNS, CONSTITUTIONAL PROCESS, *supra* note 5, at 152-53, social choice identifies an inevitable subset of intractable collective decision making problems. The Supreme Court's combined rules, including outcome voting and *Marks*, resolve the general run of cases, isolating collective choice problems, as much as feasible, to that subset.

> majority resolutions of controlling issues lead logically to the dissent. Lower courts should not presume that one or more justices embracing a broader rule, whether consistent with the outcome or in dissent, prefers an opposing broad rule to an opinion expressing the apparent narrowest grounds opinion, unless the Justice clearly signals that intent by joining the opinion.

D. Abandoning *Marks* Would Compromise Norms that Motivate Forming Majority Supreme Court Opinions

If this Court were to abandon the *Marks* rule, it would not only create problems of guidance and indeterminacy in cases in which the *Marks* premise properly applies; it would also undermine norms that help forge successful majority opinions. The *Marks* doctrine is important beyond the limited category of cases in which it formally applies. The narrowest grounds doctrine serves two purposes. *Marks* not only governs identifying the controlling opinion in non-majority cases; it also creates a norm affecting judicial accommodations within the Supreme Court itself.

Adarand Constructors v. Pena, 515 U.S. 200 (1995), illustrates how abandoning *Marks* would

compromise that norm. In *Adarand*, Justice O'Connor, writing for a majority,[16] applied strict scrutiny in challenges to federal race-based set-aside programs. *Adarand* overruled part of an earlier majority Supreme Court case, *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which had instead applied intermediate scrutiny. The critical portion of *Adarand* was decided 5-4, with the dissenting Justices voting to retain the *Metro Broadcasting* test.

Although five Justices comprised the *Adarand* majority on this issue, a latent split remained as between Justice O'Connor, for the majority, and Justice Scalia, who joined her opinion and who also wrote a separate concurrence in part and concurrence in the judgment in part. The Court clerk signaled the split with the following unusual disclaimer. The reporting statement identified the relevant parts of Justice O'Connor's opinion as for the Court "except insofar its it might be inconsistent with the views expressed in Justice Scalia's concurrence." *Adarand*, 515 U.S. at 204.

In part IV-D of her majority opinion, Justice O'Connor reiterated her earlier argument against the claim that "strict scrutiny is strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 237 (internal quotation omitted). Justice O'Connor suggested that, at least in theory, some race-based preferences

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[16] This excludes part III-C of Justice O'Connor's opinion, on the separate issue of stare decisis, which only Justice Kennedy joined. *Adarand*, 515 U.S. at 231.

might survive the heightened standard of review.[17] In his separate opinion, Justice Scalia reiterated his view that virtually all race-based classifications are unconstitutional. For Justice Scalia, strict scrutiny was, and should be, fatal.

Notwithstanding this significant difference respecting a critical part of Justice O'Connor's majority opinion, Justice Scalia joined. This decision helps to illustrate *Marks*'s second critical function.

Adarand presented three views that can be expressed along a single dimension. The dissenters would have employed intermediate scrutiny and upheld the challenged race-based program; Justice O'Connor applied strict scrutiny, striking the program down, but left open the possibility of race-based programs that might satisfy her test; and Justice Scalia applied strict scrutiny, but would have closed the door to virtually any race-based programs. The three opinions align along the dimension capturing broad-to-narrow equal protection limits on race-based set-aside programs.

Had Justice Scalia declined to join part III-D of Justice O'Connor's opinion, his opinion on this issue would have rested on broader grounds, and thus it would not have controlled under *Marks*. The result would have been a 1-4-4 split, with Justice O'Connor's strict, non-fatal, test stating the holding on narrowest grounds. It appears likely that because Justice Scalia would not have stated the holding in

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[17] *Grutter v. Bollinger*, 539 U.S. 306 (2003), revealed that the remaining non-fatal case involved race-based affirmative action programs in state institutions of higher learning.

any event, he joined Justice O'Connor's opinion, including the part with which he disagreed, to give *Adarand* majority status. This was necessary to overturning the part of *Metro Broadcasting* resting on intermediate scrutiny. Whether or not Justice Scalia joined, Justice O'Connor's opinion would have expressed the *Adarand* Court's holding. But only if Justice Scalia joined would Justice O'Connor's opinion acquire needed precedential status on the Court to displace the *Metro Broadcasting* rule.[18]

Adarand highlights a critical feature of *Marks*. Although lower courts are obligated to adhere to narrowest grounds opinions, the Supreme Court is not. This is not a normative claim about how *Marks should* apply; it is a recognition of how this Court applies *Marks*. This Court is not bound by nonmajority narrowest grounds opinions. That facet of

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[18] *Washington v. Glucksberg*, 521 U.S. 702 (1997), is the converse of *Adarand*. Justice O'Connor joined a majority opinion, holding that there is no due process right to physician-assisted suicide, but separately concurred, expressing her narrower view endorsing the double-effect doctrine. That doctrine allows physicians to administer palliative care, such as morphine, even if doing so hastens death, provided the purpose is not termination of life. *Glucksberg* brings the accommodative and predictive readings of *Marks* into potential conflict. Although Justice O'Connor represented the median view, she incurred no cost in expressing her narrower view because she also joined the majority opinion, giving it precedential status. Had Justice O'Connor concurred in the judgment, her narrowest grounds opinion would have controlled under *Marks*, but would not have created a precedent on the Court itself. Contrary to Professor Re, *supra* note 12, at 22, *Marks* motivates the Justices to forge majority opinions or to pay a price of a nonprecedential opinion in the Supreme Court.

Marks encourages majority opinions because only majority opinions gain desired precedential status on the Court itself.

Imagine instead that this Court were to adopt the approach to non-majority opinions endorsed by Petitioner. Even when the Court issues a non-majority decision in which the opinions align along one dimension, lower courts would be free to adopt the reasoning of whichever opinion consistent with the judgment they deem more persuasive, or even to devise independent rationales.

In *Adarand*, Justice Scalia preferred his broader, strict and fatal, rationale, to Justice O'Connor's strict, non-fatal, rationale. Unconstrained by *Marks*, which would render Justice O'Connor's opinion controlling, Justice Scalia might well have elected not to join the part of her opinion that overturned *Metro Broadcasting*, resting only on his separate opinion. The resulting non-majority opinion would have allowed lower courts to select his reasoning or Justice O'Connor's, or to devise their own. Instead, under *Marks*, because Justice O'Connor's holding would have controlled in lower courts even without Justice Scalia joining, Justice Scalia was encouraged to join her opinion, thereby forging a majority precedent. Abandoning *Marks* risks not only undermining that doctrine's guidance function; it also risks encouraging more non-majority cases.

II. Further Arguments Against Recognizing Justice Sotomayor's Opinion as Controlling under *Marks* are Unpersuasive

A. Despite strong disagreement with Justice Sotomayor's opinion, *Freeman* is not a Case of Ambiguous Dimensionality

Even in straightforward non-majority cases like *Memoirs* and *Freeman*, one might hypothesize that the opinions do not necessarily align along one dimension. Consider, for example, a case arising under the Due Process or Equal Protection Clauses, or under the Fourth Amendment, with one opinion granting relief under a bright-line rule, another granting relief with a balancing test, and a third denying relief with a contrary bright-line rule. One or more Justices embracing either bright-line rule might, in theory, prefer the opposite bright-line rule to the seeming middle ground. If the split were 4-1-4, this would undermine the claim that the intermediate position resolves the case on narrowest grounds. A Justice, for example, who is sufficiently concerned about administrative problems under a balancing test might prefer an opposite bright-line rule, coupled with an opposite judgment, to the seeming intermediate opinion. This would map what otherwise appears as a single dimension case, susceptible to a straightforward application of *Marks*, onto two dimensions, thereby undermining the *Marks* premise. At a minimum, the possibility might appear to render dimensionality ambiguous.

The problem is exacerbated by an inherent feature of Supreme Court opinion writing; Justices are not called upon to, and typically do not, provide com-

plete information of the sort needed to confirm intuitions, however compelling, as to how they would rank each remaining opinion. In the subset of non-majority cases such as *Kassel*, we can infer multi-dimensionality from previously identified objective features: When two opinions resolve the controlling issues in opposite fashion yet achieve the same judgment, and when the dissenting opinion provides a partially favorable resolution to each remaining opinion, yet reaches a contrary judgment, the case implicates two dimensions, and the *Marks* premise breaks down. In such cases, majority resolutions of controlling issues lead to the dissent.

Lower courts cannot know with certainty, however, what the rankings over each opinion are for those Justices embracing seemingly more extreme opinions, such as opposing bright-line rules. This remains true even though opposing resolutions of the controlling case issues, coupled with opposing judgments, strongly imply a single dimension. Administering the narrowest grounds doctrine necessarily requires resting on logical presumptions, and the strength of those presumptions depends on whether *Marks*, or an alternative, is the default rule. With *Marks* in place, these presumptions need only be invoked when this Court fails to produce a majority opinion. As previously explained, abandoning *Marks* undermines norms that help promote majority opinions. An unintended consequence of abandoning *Marks*, therefore, would be requiring lower courts to invoke a set of workable presumptions over a larger number of cases.

In a minuscule set of Supreme Court cases, one or more justices switched votes, acquiescing in a con-

trary majority resolution of a controlling issue as compared with how that Justice would have resolved the issue on its merits. The vote-switching Justice thus reached an issue otherwise foreclosed by the internal logic of the written or joined opinion, or transformed what would have been *dicta* on one issue into part of the Court's holding. The consequence of the vote switch in each case was to achieve a contrary majority resolution on that issue, and ultimately on the judgment, for the Court as a whole.

To illustrate, reconsider the hypothetical in which a 4-1-4 Court denies relief, with four justices who deny standing, but who would have granted relief on the merits; one justice who confers standing, but would deny relief on the merits; and four dissenting justices who would confer standing and grant relief on the merits. Under outcome voting, the result is a non-majority case denying relief, with opinions across two dimensions.

Assume one member of the plurality seeking to avoid this result acquiesces to the contrary five-Justice majority on standing. This Justice transforms the dissenting group into a majority that grants standing and relief on the merits. The vote switch not only changes the judgment; it also produces a majority opinion. When a Justice switches votes, we can infer an underlying problem of dimensionality, albeit one resolved in favor of a majority opinion by the switch itself. Although members of

this Court and legal scholars have criticized vote switching, no rule prohibits it.[19]

In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59–66 (1996), Chief Justice Rehnquist, writing for a majority, declined in part to give precedential status to *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). The Chief Justice implied that Justice White's vote switch in *Union Gas* undermined the presumption that majority decisions are entitled to precedential deference. More recently, in *Hanover 3201 Realty v. Village Supermarkets, Inc.*, 806 F.3d 162 (3d Cir. 2015), Judge Ambro and Judge Greenberg, of the United States Court of Appeals of the Third Circuit, debated the merits of Judge Ambro's vote switch, discussing in-depth several of the scholarly works cited in this brief.

Vote switching rarely occurs. Whatever one's normative view of the practice, it remains available as a means of signaling discontent with a case presenting an underlying problem of dimensionality. Since it results in a majority opinion, vote switching ultimately avoids the need to apply *Marks* in a context in which its premise fails to hold. The availability of vote switching, and the rarity with which it is exercised, reinforces the intuition that non-majority cases that appear to rest along a single dimension actually do rest on a single dimension.

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[19] *See, e.g.*, John M. Rogers, *"I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides*, 79 KY. L. REV. 439 (1990-91); Maxwell L. Stearns, *Should Justices Ever Switch Votes?*, *supra* note 5 (collecting cases).

This intuition is reflected in the proposed guidance statement for lower courts. Lower courts should assume a single dimension, and thus that *Marks* applies, absent either of the two identified circumstances: (1) objective markers of two dimensions, as seen in *Kassel*, and (2) a revealed intent, through voting behavior, that transformed what might have been a two-dimensional non-majority case into a majority opinion. Signaling is costly to the Justice who sends it because vote switching requires subordinating a preferred ruling on an issue and risks limiting the precedential impact of the resulting majority opinion, as seen in *Seminole Tribe*. Presuming a single dimension unless a Justice willingly incurs that cost helps ensure that lower courts understand when to assume that the *Marks* doctrine does and does not apply.

Absent such direct evidence that opinions do not align on one dimension, lower courts should not presume that in a case in which one camp embracing a balancing, or other intermediate, test is bounded by two camps embracing opposing bright-line rules that a Justice favoring one of the bright line rules would prefer the opposite bright line rule to the apparent middle ground. This analysis holds even when the opinions are 4-1-4 as an opinion of one sometimes dominates along a single dimension. A Justice wishing to signal preferring a seemingly opposite extreme view has the option, and must bear some cost, to make that plain. The Justice may do so, for example, by conceding to a majority that rejects any form of balancing text, and joining those who embrace the opposite bright line rule. Doing so displaces the application of *Marks*, and, at the same time, changes

the Court's judgment. This only succeeds, however, if there is a clear understanding that the narrowest grounds doctrine is, in fact, the default rule. This is the regime embraced by current practice. That practice minimizes opportunities for lower court speculation as to which opinion controls in non-majority Supreme Court cases.

B. The *Epps* Hypotheticals Implicate the Holding-*Dictum* Distinction, not the Application of *Marks* to *Freeman*.

Petitioner's Brief (p.52) relies on hypotheticals that appear to invert the relationship between Justice Kennedy's and Justice Sotomayor's opinions in *Freeman*. *See United States v. Epps*, 707 F.3d 337, 350 n.8 (D.C. Cir. 2013); see also *United States v. Davis*, 825 F.3d 1014, 1023 (9th Cir. 2016) (*en banc*). The *Davis* court summarized the hypotheticals as follows:

> [T]he parties may state in the plea agreement that a particular range applies and agree to a sentence at the bottom of that range, but the district court may not agree that the range determined by the parties applies, finding for example that the career offender range is applicable instead, but notwithstanding this finding accept the plea because it is to a term that is acceptable to the court for reasons unrelated to the guideline range determined by the parties.
>
> [*Epps*, 707 F.3d at 350] n.8. Justice Sotomayor would allow a sentence re-

> duction in this example because the agreement explicitly "call[s] for the defendant to be sentenced within a particular Guidelines sentencing range." *Freeman*, 564 U.S. at 538, 131 S. Ct. 2685 (Sotomayor, J., concurring in the judgment). The plurality, on the other hand, "would find [Freeman] ineligible because the range that the parties agreed to played no role in the court's determination that this was an appropriate sentence, despite the fact that the court imposed the agreed-upon term of imprisonment." *Epps*, 707 F.3d at 350 n.8. Thus, the plurality opinion is actually the narrower one in certain respects.

A second example produces a similar result:

> The sentencing court ... might consider and reject the guideline range used by the parties, not because the court finds that a different guidelines range (such as the career offender range) applies, but because, having considered the applicable guidelines range, the court rejects it as a matter of policy and selects its sentence without regard to it.

Id. Here again, if the court decides "for reasons unrelated to the guidelines range to impose the sentence the parties agreed upon," the defendant would be

> eligible for a reduction under Justice Sotomayor's approach but not under the plurality's. *Id. Davis*, 825 F.3d at 1023.

These seemingly anomalous results arise from a specific feature in the wording of Justice Sotomayor's *Freeman* opinion, which the Chief Justice discussed in dissent. The Chief Justice explained:

> In the first half of the opinion, the inquiry properly looks to what the judge does: He is, after all, the one who imposes the sentence. After approving the agreement, the judge considers only the fixed term in the agreement, so the sentence he actually imposes is not "based on" the Guidelines.
>
> In the second half of the opinion, however, the analysis suddenly shifts, and focuses on the parties: Did they "use" or "employ" the Guidelines in arriving at the term in their agreement? But § 3582(c)(2) is concerned only with whether a defendant "has been sentenced to a term of imprisonment based on a sentencing range." Only a court can sentence a defendant, so there is no basis for examining why the parties settled on a particular prison term. *Freeman*, 564 U.S. at 547 (Roberts, C.J., dissenting).

As applied to both defendant Freeman and defendant Hughes, this analytical shift did not come

into play. The different case facts, with the *Freeman* plea at the low end of a subsequently reduced Guideline range, and the *Hughes* plea below the low end of the Guideline range, and not meeting Justice Sotomayor's other conditions, provide the basis for an application on which the parties agree: if Justice Kennedy's opinion controls, both Freeman and Hughes obtain relief, and if Justice Sotomayor's opinion controls, Freeman obtains relief, but Hughes does not.

In the hypotheticals, by contrast, the plea agreement recommends sentencing based on a Guidelines range or recommends a sentence based on the guidelines, but the judge imposes the same sentence, or another, for reasons independent of the plea agreement or the Guidelines. Although Justice Sotomayor's analytical shift, from focusing on the bases for the judge's sentencing determination to the bases for the parties' plea agreement is not implicated in *Freeman* and *Hughes*, it could arise in future cases.

Justice Sotomayor's *Freeman* opinion might be read to imply that whereas Justice Kennedy generally presumes that a sentence following a plea agreement is based on the Guidelines, she applies that presumption only in cases with objective evidence of a meeting of the minds as between the lawyers writing the plea agreement and the sentencing judge that sufficiently demonstrates that the sentence is based on the Guidelines. The disjunctive language, shifting from judge to lawyers, leaves open the possibility, whether or not intended, of a case in which the lawyers intend a sentence based on the Guidelines, but the judge does not. Conversely, Justice Kennedy's opinion, by focusing on the judge's intent,

leaves open the possibility, again whether or not intended, that although the lawyers might intend the sentence to be based on the Guidelines, a judge might expressly signal otherwise.

Resolving these hypotheticals is unnecessary. Each at most raises the limits of the reasoning within Justice Sotomayor's or Justice Kennedy's opinions, but not the question of which opinion expresses the *Freeman* holding on narrowest grounds. As applied to the *Freeman* facts, Justice Sotomayor's opinion is narrower because it permits relief in fewer future cases. *Hughes* demonstrates that narrower reach.

The attenuated nature of these hypotheticals is not the problem. Rather, the problem is that any opinion, for a majority or even a unanimous Court, can invite hypotheticals that test the limits of its stated reasoning, thereby demonstrating it to be unintentionally over- or under-inclusive.[20] Accepting a dominant second choice no more implies agreeing to every proposition taken to it logical extreme than does joining a majority opinion; nor does it imply predicting future doctrinal directions, irrespective of potential changes on the Court. Lower courts confront the challenge of discerning the proper scope of

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[20] Identifying an opinion as controlling under *Marks* does not imply that no set of hypothetical facts could test the limits of the holding. Identifying the holding generally focuses on what is necessary to resolve the immediate case. Although there are limits to the necessity analysis, *see* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1055–61 (2005), that understanding remains helpful in the general run of cases, including *Freeman*.

holdings regardless of the number of Justices joining the controlling opinion. Sorting holding and *dictum* is independent of identifying which opinion controls under *Marks*.

CONCLUSION

The Eleventh Circuit correctly applied *Marks* in *Hughes*. This Amicus expresses no view on how the *Hughes* case should be resolved.

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APPENDIX

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